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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/068,947	02/11/2002	Heiko Reinhardt	87333.2800	2316
30734	7590	03/29/2005		EXAMINER
BAKER + HOSTETLER LLP				SINES, BRIAN J
WASHINGTON SQUARE, SUITE 1100				
1050 CONNECTICUT AVE. N.W.			ART UNIT	PAPER NUMBER
WASHINGTON, DC 20036-5304			1743	

DATE MAILED: 03/29/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/068,947	REINHARDT ET AL.	
Examiner	Art Unit		
Brian J. Sines	1743		

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### **Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

1)  Responsive to communication(s) filed on 21 December 2004.

2a)  This action is **FINAL**.                            2b)  This action is non-final.

3)  Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

4)  Claim(s) 1-33 is/are pending in the application.  
4a) Of the above claim(s) 1-3 is/are withdrawn from consideration.  
5)  Claim(s) \_\_\_\_\_ is/are allowed.  
6)  Claim(s) 4-33 is/are rejected.  
7)  Claim(s) \_\_\_\_\_ is/are objected to.  
8)  Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

9)  The specification is objected to by the Examiner.

10)  The drawing(s) filed on 2/11/2002 is/are: a)  accepted or b)  objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)  The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

12)  Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a)  All b)  Some \* c)  None of:  
1.  Certified copies of the priority documents have been received.  
2.  Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3.  Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

1)  Notice of References Cited (PTO-892)  
2)  Notice of Draftsperson's Patent Drawing Review (PTO-948)  
3)  Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date .  
4)  Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_.  
5)  Notice of Informal Patent Application (PTO-152)  
6)  Other: \_\_\_\_.

**DETAILED ACTION**

***Election/Restrictions***

Applicant's election with traverse of group II comprising claims 4 – 33 in the reply filed on 21/21/2004 is acknowledged. The traversal is on the ground(s) that a search and examination of all pending claims would not be a serious burden to the examiner due to the availability of powerful electronic search engines. This is not found persuasive because, as discussed in the election/restriction requirement, the inventions are considered independent and distinct, and are restricted appropriately according to the guidelines set forth in MPEP § 806.05(h). Each of the invention groups have a separate status in the art, as shown by their different classifications, and would therefore require different fields of search (see MPEP 803).

The requirement is still deemed proper and is therefore made FINAL.

***Information Disclosure Statement***

The specification discusses foreign document DE 3815528 C1 and U.S. patent 6,117,687 A. The listing of references in the specification is not a proper information disclosure statement. 37 CFR 1.98(b) requires a list of all patents, publications, or other information submitted for consideration by the Office, and MPEP § 609 A(1) states, "the list may not be incorporated into the specification but must be submitted in a separate paper." Therefore, unless the references have been cited by the examiner on form PTO-892, they have not been considered.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 4 – 33 are rejected under 35 U.S.C. 102(b) as being anticipated by Selfridge et al. (U.S. Pat. No. 4,572,427) (hereinafter “Selfridge”). Selfridge teaches a controlled gas atmospheric incubation apparatus comprising: an inner container or chamber (13); a humidifier (67); urethane insulation (17); a controllable electric heating element (19); and transparent glass doors (14 & 16) (see col. 4, line 16 – col. 12, line 18; figures 1 – 4). Selfridge does teach the utilization of a pan holding a water bath for humidification purposes (see col. 2, lines 34 – 43). Selfridge teaches the incorporation of a microprocessor computer control system (104), which is coupled to various sensors and heaters, for controlling the operation of the incubation apparatus (see col. 9, lines 1 – 17). Selfridge further indicates the incorporation of a door sensor or switch system that is operatively involved in controlling the incubation system (see col. 9, lines 18 – 22). The Courts have held that apparatus claims must be structurally distinguishable from the prior art in terms of structure, not function. See *In re Danley*, 120 USPQ 528, 531 (CCPA 1959); and *Hewlett-Packard Co. V. Bausch and Lomb, Inc.*, 15 USPQ2d 1525, 1528 (Fed. Cir. 1990). The Courts have held that the manner of operating an apparatus does not differentiate an apparatus claim from the prior art, if the prior art apparatus teaches all of the structural limitations of the claim. See *Ex Parte Masham*, 2 USPQ2d 1647 (BPAI 1987) (see MPEP § 2114).

***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. The cited prior art teach various incubation devices.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Brian J. Sines, Ph.D. whose telephone number is (571) 272-1263. The examiner can normally be reached on Monday - Friday (11 AM - 8 PM EST).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jill A. Warden can be reached on (571) 272-1267. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

